HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Application No. 258 of 2003

1. Nand Lal S/o Baru
2. Nand Ram S/o Baru
3. Bansari S/o Punna
   All R/o village Bhauhari
   P.S. Jwalapur
   District Haridwar .....Applicants

Versus

1. State of Uttaranchal
2. District & Session Judge, Haridwar
3. S.D.M. Roorkee, District Haridwar
4. Sadhu Ram S/o Ganga Ram
   R/o village Bhauri
   P.S. Jwalapur
   District Haridwar .....Respondents

Hon'ble J.C.S. Rawat, J.

Heard Sri Manish Arora learned counsel for the applicants, Sri H.M. Bhatiya learned counsel for the for the respondents No.4 and learned A.G.A.

The petition under section 482 Cr.P.C. has been filed for setting aside the judgments and orders dated 19.3.2003 and 14.10.2003 passed by the S.D.M. Roorkee and the Sessions Judge, Haridwar respectively.

Brief facts of the case are that on 24.2.2003 an application was moved by Sadhu Ram-respondent no.4 before the District Magistrate Haridwar, in which he has stated that he purchased a piece of land from Smt. Santosh wherein a kachha road of 5 ft. wide was left for the use of the applicants. Thereafter, the said peace of land was sold to Nand Lal and Nand Ram, but the kachha road of 5ft. wide was left with the Sadhu Ram. Thereafter, Khadanja was laid on the said road and it connected the main road constructed by the Panchayat. The respondent No.2 wanted to put a gate on the road and applicants obstructed to construct the gate on the

road. Nand Lal, Nand Ram and Banarasi closed the road by constructing a wall on the road. A proceeding was drawn under section 133 Cr.P.C. on the report of the Naib Tehsildar. A conditional order was passed under section 133 Cr.P.C. on 19.3.2003 in which the learned S.D.M. directed the applicants to remove the said wall by the date fixed or to show cause and appear before the court. Perusal of the record reveals that the learned executive Magistrate while passing the conditional order dated 19.3.2003 relied upon the report of the Naib Tehsildar and thereupon he passed the conditional order under section 133 Cr.P.C Instead of objecting the said order before the S.D.M., the applicants preferred a revision before the Sessions Judge against the said conditional order, in which they have alleged that the respondent wanted to grab the said land. The said revision was dismissed vide order dated 14.10.2003. Feeling aggrieved to this, the applicants have come up before this Court.

Section 137 Cr.P.C. provides the procedure where existence of public right is denied. The applicants should have filed the objections before the court below and the Magistrate should have disposed of the applications under section 137 or section 138 Cr.P.C. In case, there is a dispute with regard to the existence of the public path, the Magistrate has ample jurisdiction to proceed under section 137 Cr.P.C. after recording the evidence of the parties as provided in the Code of Criminal Procedure.

The learned counsel for the applicants contended that the S.D.M. has passed a conditional order on the basis of the report of the Naib Tehsildar and no opportunity was given while issuing the show cause. The learned counsel for the applicants further contended

that the unconditional order was passed by the S.D.M. as the parties have right to file the objections before the S.D.M. The applicants were not doing any construction over the disputed path and there is only old construction on the spot. It is further contended that the respondent No.4 wanted to capture the disputed way and therefore the applicants moved the application. The report of the Naib Tehsildar reveals that the disputed way is inside the abadi-land and this road leads to 'Gher'(boundary) of the applicant. If the Magistrate comes to conclusion that it is a private way them the proceedings may be disposed of accordingly. In case, if it is a public way and the applicants or anybody obstructed the said way, the Magistrate can proceed in accordance with the law. It was contended on behalf of the applicants that the conditional order of the learned S.D.M. is bad in the eyes of law. The property belongs to the applicants and the alleged road is also a private park. The learned counsel for the respondent refuted the contention and contended that the disputed way is a public path. It was further submitted that the disputed facts cannot be considered by this Court. The matter regarding the existence of the public path or private path can only be ascertained by the trial court. This fact has to be decided during the trial. This court cannot go into the disputed facts of the case. It is not permissible for the High Court to look into materials, the acceptability of which is essentially a matter of trial. While exercising jurisdiction under section 482 Cr.P.C., it is not possible for this Court to act as if it is a trial court. **{State of M.P. Vs. Awadh Kishore Gupta and others SCC (Cri) 2004 p/353}.**

In view of the above, the petition lacks merit and is dismissed. However, the liberty is given to the

applicants to file the objections before the trial court and to adjudicate upon the dispute in accordance with the provisions of Code of Criminal Procedure.

Dated 5.5.2005 (J.C.S. Rawat, J.)

LSR